

Jan 03, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORRY A. W.

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-CV-03082-LRS

**ORDER DENYING
DEFENDANT'S MOTION
TO ALTER OR AMEND
JUDGMENT**

BEFORE THE COURT is Defendant's Motion To Alter Or Amend Judgment Under Rule 59(e). (ECF No. 19). This motion is heard without oral argument.¹

BACKGROUND

On October 24, 2019, this court entered an order granting Plaintiff's Motion For Summary Judgment and awarding her Title II disability insurance benefits for a closed period from September 1, 2015 to July 4, 2017. (ECF No. 17). Judgment was entered in favor of Plaintiff. (ECF No. 18).

"A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law."

¹ The Commissioner has apparently opted not to file a reply to Plaintiff's response within the time afforded by the court's Local Rules.

1 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th
2 Cir. 2009).

3 Defendant asserts the court made clear errors of law in concluding the ALJ
4 failed to provide sufficient reasons for rejecting two other-source medical opinions;
5 in concluding the ALJ failed to provide clear and convincing reasons for discounting
6 Plaintiff's subjective complaints; and in awarding benefits to Plaintiff instead of
7 remanding for additional administrative proceedings.

8 9 **DISCUSSION**

10 **OTHER-SOURCE OPINIONS**

11 This court found the ALJ did not provide germane reasons for discounting the
12 other-source opinion of PA-C Turner in favor of the opinions of non-examining state
13 agency evaluators who are "acceptable medical sources." Furthermore, this court
14 found the ALJ did not provide germane reasons for discounting the other-source
15 opinion of mental health therapist, Suzanne Damstedt, in favor of the opinion of
16 consultative psychiatric examiner, Kirsten Nestler, M.D., an "acceptable medical
17 source." The court stands by the reasoning contained in its order and rejects the
18 assertion it committed a clear error of law.

19 This court did not find that a consultative examiner's opinion of a claimant's
20 limitations can never be a "germane" reason for rejecting an other-source opinion.
21 It found only that Dr. Nestler's opinion did not constitute a germane reason for
22 rejecting Ms. Damstedt's opinion in this particular case for the reasons enunciated in
23 the court's order. As this court explained:

24 What the ALJ overlooked . . . was that Damstedt was obviously
25 basing her opinion on months of therapy sessions with Plaintiff
26 and that opinion was corroborated by months of medication
27 management sessions at CWCMH. It was also corroborated by
28 Turner's treatment of Plaintiff for anxiety and panic attacks
Accordingly, the ALJ's reliance on Dr. Nestler's opinion based on
a one time examination, **uncorroborated by anything else in the
record**, cannot constitute a "germane" reason for rejecting the

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1 opinion of Damstedt.
2 (ECF No. 17 at p. 12)(Emphasis added).

3 Dr. Nestler's opinion did not reveal anything regarding her "familiarity with
4 the record," 20 C.F.R. §404.1527(c), that supported her opinion. Indeed, as the court
5 observed in a footnote, Dr. Nestler arguably concluded Plaintiff did not even suffer
6 from a "severe" mental impairment and if so, this was at odds with the ALJ's finding
7 that Plaintiff's anxiety was "severe." *Id.* at n. 4. It is not a germane reason to reject
8 the opinion of an other-source merely because an "acceptable medical source" has
9 offered an opinion to the contrary.²

10 This court rejected the ALJ's finding that there was no support or explanation
11 provided for PA-C Turner's opinion regarding the extent of Plaintiff's physical
12 limitations. (ECF No. 17 at p. 9). This court wrote:

13 There was . . . plenty of support for Turner's opinion from
14 her own treatment notes . . . in addition to the treatment notes
15 from the [Water's Edge] pain clinic. According to the ALJ,
16 the record showed that Plaintiff "was doing well with
17 controlled symptoms" and that she "returned to working
18 in childcare within a few months of this evaluation, caring for
19 two-year olds, which exceeds [her] less than sedentary
20 restrictions." The record which the ALJ cites in support of his
21 assertion that Plaintiff "was doing well with controlled
22 symptoms" pertains to Plaintiff's anxiety symptoms . . .
23 and indeed, one of the reports . . . is from November 2017,

20 ² *Britton v. Colvin*, 787 F.3d 1011 (9th Cir. 2015), cited by Defendant,
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22 certainly does not stand for such a proposition. There, the Ninth Circuit found the
23 ALJ justifiably discounted the opinion of a nurse practitioner regarding the
24 claimant's exertional capacity, not only because a doctor, "an acceptable medical
25 source," testified to the contrary, but also because of the claimant's daily
26 activities, such as home schooling her children. *Id.* at 1013.

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1 several months after the claimed closed period of
2 disability. Furthermore, it was actually six months from
3 Turner's January 2017 evaluation when Plaintiff returned to
4 work full-time in childcare. Moreover, without knowing the
physical demands of that job as actually performed, it is unclear
whether it exceeded the physical restrictions opined by Turner
in January 2017.

5 (*Id.*).

6 While conceding the ALJ "could have better explained his reasoning," the
7 Defendant contends "a reasonable mind could accept that Plaintiff's child care
8 activities- which included working two or three days a week caring for children at a
9 child care center- contradicted the extreme opinions of Ms. Turner that Plaintiff could
10 not perform even sedentary work." As noted by the ALJ, in April 2017, Plaintiff
11 obtained a part-time work at a child-care center, and in May 2017, she was working
12 two to three days as a substitute there. (AR at p. 18).

13 In the absence of evidence establishing the physical demands of this part-time
14 work as performed by Plaintiff, it is not reasonable to assume performance of this
15 work was inconsistent with the physical limitations opined by PA-C Turner in
16 January 2017. Furthermore, Turner indicated in her evaluation that if Plaintiff
17 attempted to work a 40 hour week, she would miss on average two days a week. That
18 is consistent with the part-time work Plaintiff commenced in May 2017, but does not
19 necessarily mean Plaintiff was then capable of performing substantial gainful activity
20 consistent with the physical limitations opined by Turner.³

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23 ³ For claims filed on or after March 27, 2017, physician assistants are now
24 considered "acceptable medical sources." 82 Fed. Reg. 5844 (Jan. 18, 2017). And
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26 so, under the current rules, PA-C Turner would be considered an "acceptable
27 medical source" just like the non-examining state agency evaluators whose
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1 Defendant contends that at least a remand was in order for additional
2 proceedings to establish the physical demands of the part-time work undertaken by
3 Plaintiff in May 2017. Plaintiff's limitations, however, were not merely physical.
4 She had "severe" mental limitations caused by her anxiety. In January 2017, therapist
5 Damstedt opined that Plaintiff would miss on average four or more days because of
6 her anxiety (a condition which Turner also treated). As discussed above, the ALJ did
7 not offer a germane reason for rejecting Damstedt's opinion in favor of Dr. Nestler's
8 opinion.

10 **SYMPTOM TESTIMONY**

11 Contrary to the Defendant's assertion, this court did not declare as a matter of
12 law that improvement with medication cannot be a clear and convincing reason for
13 discounting a claimant's symptom testimony. Instead, this court acknowledged that,
14 as pointed out by the ALJ in his decision, Plaintiff's condition continued to improve,
15 ultimately resulting in her ability to return full-time work, but concluded this was "not
16 a clear and convincing reason to reject Plaintiff's testimony that she was as limited
17 as asserted by her and P A-C Turner and therapist Damstedt during the closed period
18 at issue." (ECF No. 17 at p. 13). Plaintiff's improvement was not a "clear and
19 convincing reason" under the facts of this particular case to discount her testimony
20 that the severity of her limitations was such that she could not engage in substantial
21 gainful activity during the closed period alleged by her. Instead, it was consistent

23 opinions the ALJ gave greater weight. New rules clarify that all medical opinions
24 will be assessed for persuasiveness, primarily focusing on supportability
25 (including objective evidence and supporting explanations provided by the source)
26 and consistency with other evidence and opinions. 20 C.F.R. §404.1520c(b)(2).

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1 with the medical progress she continued to make until she was able to resume
2 substantial gainful activity in July 2017. The court did not make a clear error of law.

3 4 **REVERSAL VERSUS REMAND**

5 Finally, the court did not clearly err in reversing for payment of benefits instead
6 of remanding for additional administrative proceedings. Defendant contends remand
7 for additional proceedings is warranted because Plaintiff's subjective complaints and
8 the opinions of PA-C Turner and therapist Damstedt are "contradicted by Plaintiff's
9 childcare activities during the alleged period of disability . . . , by the opinion of Dr.
10 Nestler, who examined Plaintiff . . . , and by the opinions of three state agency
11 doctors, who also opined that Plaintiff's limitations were only those assessed by the
12 ALJ" in his RFC determination. For the reasons discussed in its summary judgment
13 order and in this order, the opinions of Dr. Nestler and the state agency evaluators do
14 not hold as much weight as the opinions of PA-C Turner and Ms. Damstedt which the
15 ALJ gave legally insufficient reasons for rejecting. And Plaintiff's child care
16 activities during the closed period of disability are not contrary to the limitations
17 testified to by Plaintiff and opined by PA-C Turner and Ms. Damstedt.

18 The lack of an explanation for the one year gap in Plaintiff's treatment at the
19 Water's Edge pain clinic is not a compelling basis for a remand in light of all the
20 medical evidence of record and the fact the ALJ made no mention whatsoever of
21 Plaintiff's treatment at the pain clinic, including any gaps in treatment. (ECF No. 17,
22 n. 2 at pp. 7-8).

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1 **CONCLUSION**

2 Defendant's Motion To Alter Or Amend Summary Judgment (ECF No. 19) is
3 **DENIED.**

4 **IT IS SO ORDERED.** The District Executive shall forward copies of this
5 order to counsel of record.

6 **DATED** this 3rd day of January, 2020.

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8 *s/Lonny R. Suko*

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LONNY R. SUKO
10 Senior United States District Judge
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